

URÍA
MENÉNDEZ

Foundations: Practical Guide to Trustees' Duties and Civil Liability

3rd edition – May 2026



WARNING

This guide is for information purposes only and covers selected aspects of Spanish legislation on the duties and civil liability regime of trustees. The information and comments in this guide do not constitute legal advice.

This guide is current as at May 2026. URÍA MENÉNDEZ assumes no obligation to update or revise its content.

AUTHORS



José Soria
Partner
jose.soria@uria.com



Alexandra Molina-Martell
Counsel
alexandra.molina@uria.com



Jorge Azagra
Partner
jorge.azagra@uria.com

In collaboration with:

Eva Busquets, Associate

Sergio Reyes, Associate

CONTENTS

1. Introduction.....	5
2. Trustee duties	7
2.1. Duty of care.....	7
2.1.1. Duties arising from the duty of care	9
2.1.2. Duty of oversight or supervision.....	10
2.1.3. Duty to remain informed.....	11
2.1.4. Management of the foundation's assets.....	12
2.2. Duty of loyalty	12
2.2.1. Duties arising from the duty of loyalty.....	13
2.2.2. Avoiding conflicts of interest and self-dealing	13
3. Trustee civil liability regime	15
3.1. Nature	16
3.2. Conditions.....	16
3.3. Liable parties.....	17
3.3.1. Liability of trustees compared to that of managers and managing directors	17
3.3.2. Representatives of corporate trustees	18
3.4. Exemption from liability	18
3.5. Trustee removal or dismissal as a consequence of liability	19
4. Liability actions	21
4.1. Liability to the foundation	21
4.2. Liability to third parties	21
5. Insolvency liability.....	23
5.1. Duty to file for insolvency.....	23
5.2. Notification of negotiations and its effects	24
5.3. Trustee liability in the classification of insolvency proceedings	24
5.4. Determining insolvency liability	26
5.5. Relationship between civil and insolvency liability.....	27

FOUNDATIONS: PRACTICAL GUIDE TO TRUSTEES' DUTIES AND CIVIL LIABILITY

Introduction | 1

This guide provides a practical overview of the duties and civil liability regime applicable to the members of the board of trustees (*patronos*) of Spanish foundations operating at national level and governed by state legislation. Its purpose is to illustrate clearly how trustees should fulfil their obligations and to provide practical guidelines to help them perform their duties.

This guide addresses the following aspects of the role of trustee:

- a) trustee duties;
- b) the liability regime;
- c) liability actions; and
- d) insolvency liability.

In preparing this guide, we have taken into account Foundations Law 50/2002 of 26 December ("**Law**") – as currently in force – including the amendments introduced by Royal Decree-Law 5/2023 of 28 June and Basic Law 2/2024 of 1 August on equal representation and gender balance; Royal Decree 1337/2005 of 11 November foundations falling under state jurisdiction ("**Foundation Regulations**"); and Royal Legislative Decree 1/2020 of 5 May approving the consolidated text of the **Insolvency Law** – as currently in force – including the amendments introduced by Law 16/2022 of 5 September, given that it is relevant to the duties and liability regime of foundation trustees.

Although Spain's autonomous regions have legislative powers in relation to foundations, this guide focuses only on national legislation. However, foundations operating mainly within a single Spanish autonomous region should also consider the relevant regional legislation.

Trustees are responsible for the management and representation of the foundation. They also exercise important structural powers that can significantly affect the foundation's future, such as amending and approving its merger, dissolution or liquidation. This guide focuses on their administrative functions.

The Law requires trustees to act with the diligence of a "loyal representative". As the Law does not define this standard, its meaning must be interpreted in light of related legal principles. In practice, the legal regime governing the mandate or the administration of limited companies is referred to for this purpose.

To help trustees perform their duties, foundations should consider having a code of good governance to support effective management and provide greater clarity on the role of trustees. To this end, general good governance guidelines may be useful. Furthermore, foundations should also take into account the code of conduct applicable to temporary investments in the securities market (CNMV Agreement of 20 February 2019).

Finally, foundations that meet the thresholds set out in the ninth additional provision of the Law – namely, an average workforce of more than 125 and an annual budget exceeding €20 million – must ensure that appointments to the governing body respect the principle of balanced representation between women and men. Under this requirement, neither sex may represent more than 60% or less than 40%. Foundations whose aims or purpose justify a different composition may be exempted from this obligation, provided that the reasons are set out in the action plan. Although this obligation will apply from 30 June 2028, trustees should take this into account now when planning the composition of the board of trustees.

2.1. Duty of care

The requirement that trustees act with the diligence of a "loyal representative" operates both as a standard of conduct and as a source of specific obligations. Trustees must therefore fulfil their

duties in accordance with the Law, the articles of association and the foundation's internal rules of conduct with the level of care expected of a loyal representative. In practice, this means that trustees must perform their duties acting diligently and in the best interests of the foundation. This includes fulfilling the duties described in this guide, such as supervising the foundation's activities and remaining properly informed at all times.

The duty to act diligently is not assessed in abstract terms or independently of the circumstances of each case. The required standard of diligence must be evaluated objectively, taking into account factors such as (i) the nature and scale of the foundation's objective, (ii) whether the position is remunerated, and (iii) the specific responsibilities of each member of the governing body.

- (i) A key distinction can be drawn between those that engage in an economic activity and those that do not.

The former, which may be described as "endowment" foundations, are typically funded through the founder's endowment and, in some cases, from donations. In these foundations, the board of trustees will often meet twice a year (once to approve the management report, the budget and the annual accounts, and once to approve the action plan).

By contrast, in "corporate" foundations, trustees are expected to devote significant time to the role, make important financial decisions and assume responsibilities similar to those of directors of limited companies. Although trustees generally serve without remuneration, it is increasingly common for those providing services to the foundation beyond their duties as board members to be paid for those services, subject to the prior authorisation of the supervisory authority.

In light of these differences, it would be reasonable to conclude that the same standard of care should not apply equally to trustees of endowment foundations and corporate foundations.

- (ii) Furthermore, as with a mandate, whether the position is remunerated may be relevant when assessing the required standard of diligence.
- (iii) In addition to the type of foundation and whether the trustees receive remuneration, relevant factors include the structure of the governing body, the position held by the trustee within that structure (e.g. chair or secretary) and the functions they perform. In this regard, foundations – and, consequently, the structure of their governing bodies – have evolved significantly over time.

As we explain in this guide, current legislation allows the board of trustees, subject to exceptions, to delegate powers to one or more of its members, typically through delegated committees. Functions may also be entrusted to directors-general, managers or advisers. In these cases, the trustees' duty of care primarily takes the form of a duty to

supervise the actions of those delegated bodies or officers.

2.1.1. Duties arising from the duty of care

Trustees must exercise their duties diligently, be proactive in doing so, and remain committed to carrying out their functions, which may relate to management, to varying degrees – e.g. by setting general policies and strategies, appointing managers or carrying out day-to-day management tasks – or to promoting the foundation and performing other duties connected with its operations, such as preparing annual accounts or drafting reports.

Exercising these powers involves a degree of discretion, particularly in relation to management, strategic or business decisions. Trustees and managers must make business and strategic decisions on an ongoing basis, often in circumstances where the outcome is uncertain. When choosing between various alternatives, it is not always possible to determine which option best serves the foundation's purpose at the time the decision is made, even if that decision may later be viewed differently. By accepting their appointment, trustees undertake an obligation of means rather than an obligation of results; in other words, they must perform their duties in accordance with the law, the foundation's articles of association and the required standard of care.

Furthermore, because the foundation's board of trustees operates as a collegiate body, trustees must actively perform their role to ensure that the board properly exercises its duties. There is also a risk that some trustees may fail to pay sufficient attention to their responsibilities. It is therefore appropriate to highlight certain behaviours that may indicate that a trustee is performing the role effectively, while recognising that some behaviours may need to be adapted to the circumstances of each case. Particularly, trustees should seek to:

- (i) devote sufficient time and effort to regularly monitoring matters arising from the foundation's management;
- (ii) review the agenda for upcoming board meetings and, where appropriate, request the inclusion of additional items;
- (iii) prepare adequately for board meetings and, where applicable, meetings of committees or delegated bodies in which they participate (for example, by reviewing the information provided before the meeting, gathering any additional relevant information and requesting any clarifications they deem necessary), so that they can deliberate on an informed basis;
- (iv) attend board meetings and actively participate in them and, where applicable, in meetings of committees or delegated bodies, including by proposing matters for discussion that they deem necessary, even if those matters are not included on the agenda;
- (v) if unable to attend a board meeting in person, appoint a proxy and provide voting instructions;

- (vi) request the chair of the board of trustees to call a meeting or, where appropriate, initiate one together with other trustees, to address matters relevant to the foundation's administration;
- (vii) monitor the implementation of resolutions and verify that they are complied with; and
- (viii) when exercising powers of disposal, comply with the principles of cost-effective management and financial balance, maintain the yield and profitability of the assets and rights forming part of the foundation's assets, and minimise management costs.

2.1.2. Duty of oversight or supervision

Current legislation allows a board of trustees to delegate its powers and grant general or specific powers of attorney to one or more trustees, subject to some exceptions.

In this context, it is increasingly common for foundations to have boards of trustees with a large number of members, many of whom do not actively participate in the foundation's day-to-day administration and whose involvement is largely limited to approving the annual accounts.

In such cases, foundations often establish delegated committees composed of a small number of trustees and operating under the authority of the board of trustees. These committees are responsible for representing and managing the foundation and may exercise the functions and powers that the board of trustees may delegate to them, subject to the limitations set out in the articles of association, the Law and the Foundation Regulations. To this end, the Foundation Regulations stipulate that "in all cases, functions legally attributed to the board of trustees as the governing and administrative body responsible for fulfilling the foundation's objectives and managing its assets must be respected". The board of trustees' supervisory role is therefore clearly non-delegable.

A logical consequence of the professionalisation of foundations is the delegation of executive or day-to-day management functions to a chief executive or managing director. Managing directors or chief executives are therefore responsible for the foundation's day-to-day management and for implementing the policies and strategies defined by the board of trustees.

Trustees and managers therefore perform different roles within the foundation's organisation. Trustees are primarily responsible for oversight while managers are primarily responsible for management. The duty of care also requires trustees to monitor the foundation's activities on an ongoing basis.

Trustees must take the measures necessary to ensure effective oversight over the foundation's activities. Each trustee bears this responsibility individually. Trustees must therefore supervise the bodies and persons to whom they delegate powers (e.g. delegated bodies), as well as the work of directors or managers. Where the board of trustees directly manages the foundation, that supervision will mainly concern the directors' actions. In all cases, trustees must ensure that the foundation is managed in accordance with its objectives and that its management respects the foundation's purpose and interests.

The duty of care requires trustees to remain informed about the most significant management decisions taken and how broader agreements or decisions – such as general policies or strategies – are implemented. Trustees can only discharge their duties effectively if they take an active role in this regard.

This duty also requires trustees to consider the various financial and non-financial risks (such as operational, legal, environmental or reputational risks) and to establish and review appropriate systems to identify and manage those risks.

Trustees must exercise this supervisory role in a way that is compatible with the foundation's management needs. Depending on the circumstances, this may require a degree of formalisation (such as establishing procedures for contacting directors). Assessing and implementing appropriate measures to ensure effective supervision without interfering with the foundation's management is itself part of the trustees' duty of care.

Exercising this function has some particular features arising from the collegiate nature of the board of trustees. In this regard, it is useful to consider certain guidelines for the trustees' conduct, closely linked to the right to information discussed below. The duty of oversight or supervision therefore requires trustees to:

- (i) request that the chair of the board of trustees provide specific information about the foundation's management or permit inspections at the foundation;
- (ii) request that the chair ensure that members of delegated bodies or committees, trustees with delegated functions, and directors or managers attend board meetings, and, where appropriate, propose to the chair or the board the appointment or removal of directors;
- (iii) inform the chair of the board of trustees or the other trustees of any deficiencies identified in the foundation's control systems and propose improvements;
- (iv) inform the chair of the board of trustees or the other trustees of any irregularities or malpractice identified in the foundation's management; and
- (v) alert the chair of the board of trustees or the other trustees to any risks of which they have become aware and propose appropriate measures to manage those risks.

2.1.3. Duty to remain informed

Trustees have a duty to seek – and a right to receive – the information necessary to carry out their duties and fulfil their responsibilities. Obtaining and reviewing that information is essential to ensuring that trustees act diligently, as trustees can govern the foundation properly only if they are adequately informed. Providing trustees with adequate information also supports the collegiate functioning of the board of trustees, as it enables trustees to consider different interests and viewpoints through informed deliberation, and to perform the board's duties effectively. As noted above, trustees can effectively supervise the foundation's management only if they are properly informed.

Access to information is of fundamental practical importance. Trustees have both the duty and the right to request, receive and access documents, data and information necessary to carry out their duties and functions properly. Trustees may also request information relating to specific management operations.

Trustees must also consider the implications of exercising this right. Before a board meeting, trustees must have access to the information necessary to deliberate and adopt resolutions on the matters to be discussed, as only in this way can they participate and contribute actively and in an informed manner at such meetings. Likewise, they may request appropriate clarifications regarding the deliberations taking place at the meeting. Exercising the right to information must also reflect the collegiate nature of the board of trustees and any specialisation or decentralisation of functions within it.

A trustee may therefore approach the chair or secretary of the board to request any information they deem appropriate, including information regarding the actions of managers, executives or trustees with delegated functions.

2.1.4. Management of the foundation's assets

Administering the foundation includes managing its assets. The Law requires that the foundation's assets and income to be used exclusively to pursue its purposes.

The Law also requires the board of trustees to preserve the yield and profitability of the assets and rights forming part of the foundation's assets. Trustees must therefore act in accordance with the principles of cost-effective management and financial balance. In some cases, the Law requires prior authorisation from – or notification to – the supervisory authority before the foundation's assets may be disposed of.

2.2. Duty of loyalty

The duty of loyalty requires trustees to act in the best interests of the foundation at all times. Here too, the law establishes the required standard of conduct: trustees must perform their duties with the diligence of a loyal representative, which ultimately means that they are expected to act with the loyalty of a representative as regards the person or entity they represent. The duty of loyalty requires trustees to act in good faith and in the best interests of the foundation. This duty applies to all aspects of the administration and representation of the foundation, regardless of the role performed by the board of trustees. Whether the board's role is mainly supervisory or extends to the direct management of the foundation, trustees are subject to the same duties of loyalty as regards the foundation.

These prohibitions are qualified because of the interests they seek to protect. Accordingly, as explained in the section on self-dealing, the supervisory authority may exempt transactions from these prohibitions.

2.2.1. Duties arising from the duty of loyalty

Although the Law does not specify how the duty of loyalty should be exercised, it can be interpreted as requiring trustees to:

- (i) carry out their duties with the loyalty of a faithful representative, acting in good faith and in the best interests of the foundation;
- (ii) not use their authority for personal reasons or for purposes other than those intended by the foundation's governing documents (e.g. articles of association, power of attorney);
- (iii) not disclose any information, data, reports or records to which they have access in the course of their duties, even after ceasing to be trustees, except where permitted by law or required to do so by competent authorities;
- (iv) not take part in the deliberation or voting on resolutions or decisions under which (a) a contractual relationship is established between the foundation and the trustee, their representative, their relatives up to and including the fourth degree of kinship, or their spouse or a person with whom they have a similar relationship, (b) remuneration is set for services rendered to the foundation other than those arising from their duties as trustees; or (c) liability proceedings are brought against them;
- (v) perform their duties independently, exercising their own judgement and free from the instructions of, and relationships with, third parties; and
- (vi) take measures to avoid situations in which their own interests, or those of others, conflict or may conflict with the interests of the foundation or their duties to it.

2.2.2. Avoiding conflicts of interest and self-dealing

Avoiding situations of conflict of interest is a key duty arising from the duty of loyalty. A conflict of interest arises where a trustee's interests, or the interest of a third party the trustee represents, conflict or may conflict with the interests of the foundation. This conflict need not be current and may arise even if no harm is caused to the foundation. It is sufficient that there is a risk that the trustee may not act in the foundation's interests and may instead be influenced by a personal interest, whether their own or that of another person.

This duty to avoid conflicts of interest requires trustees to obtain prior authorisation from the supervisory authority before entering into contracts with the foundation, whether in their own name or on behalf of a third party, without prejudice to any approval required from the board of trustees. This requirement also applies to natural persons acting as representatives of trustees.

A trustee acting in a situation involving a conflict of interest may render the resolution adopted subject to challenge by the supervisory authority, without prejudice to any liability the trustee may incur.

Trustee civil liability regime | 3

Private foundation legislation generally establishes a specific liability regime for trustees, limited to civil liability. This does not preclude other forms of liability – such as criminal or administrative liability – under the applicable legal regime in each case. However, this guide focuses solely on civil liability.

Trustees can incur two types of civil liability:

- (i) internal liability: to the foundation for breach of their duties to the foundation under the regime established in the Law; and
- (ii) external liability: to third parties whose interests have been directly harmed, in accordance with the general rules governing non-contractual civil liability.

To establish trustee liability, the liability actions analysed in this guide may be brought.

The liability regime applicable to trustees is preventive in nature. Its purpose is to encourage compliance with their duties, promote oversight of their management, and provide compensation for any damage caused to the foundation or to third parties as a result of the breaches of the obligations assumed by those entrusted with managing and representing the legal entity.

In accordance with article 3.5 of Law 49/2002 of 23 December, a foundation may take out civil liability insurance for the benefit of its trustees. This insurance will not be considered remuneration for the purposes of the requirement for trustees to act on an unpaid basis, provided that it covers only risks arising from performing their duties within the organisation.

For practical purposes, trustees may also be remunerated for services provided other than those inherent in the performance of their duties, provided that the conditions set out in the foundation's articles of association or other internal rules are met and that they do not participate in the foundation's financial results directly or through an intermediary person or

entity. However, in self-dealing cases, the supervisory authority's prior authorisation is required in accordance with article 28 of the Law.

3.1. Nature

Trustees may incur several types of liability:

- (i) statutory, because the obligations they must fulfil and the consequences of non-compliance are established by law;
- (ii) organic, because it is required of the natural or legal person who is a trustee of the foundation and, consequently, in their capacity as a member of the board of trustees;
- (iii) personal, because it is the natural or legal person who is required to hold the position of trustee, rather than the board of trustees;
- (iv) joint and several, because it is based on a presumption that the damage caused is attributable to the conduct of all members of the board of trustees (unless proven otherwise); therefore, a claim may be brought against any of the trustees (for example, against the most solvent one), seeking full compensation, without prejudice to that trustee's right to recover corresponding compensation from the other trustees; and
- (v) compensatory, because its purpose is to compensate for damage caused to the foundation or to third parties, as applicable. Trustees are not liable for the foundation's debts.

3.2. Conditions

Trustees incur liability where, whether intentionally or through negligence, they commit an unlawful act or omission that causes damage to the foundation or to third parties.

For a trustee to be held liable, the following conditions must be met under the general rules governing civil liability:

- (i) there must be an act or omission on the part of the trustee;
- (ii) the act or omission must be contrary to the law or the foundation's articles of association, or constitute a failure to exercise the due care required in performing their duties;
- (iii) the act or omission must cause actual and financially quantifiable damage to the foundation or to third parties; the damage may consist of both actual loss (a real and effective reduction in assets) and loss of profit (a benefit which, with a high degree of probability or near certainty, the injured party would have otherwise obtained);
- (iv) the trustee must have acted intentionally or negligently; and
- (v) the damage must result from the trustee's act or omission, such that a causal link can be established between the conduct and the damage (i.e. excluding damage caused by unforeseeable events or by foreseeable events that could not have been avoided).

3.3. Liable parties

As explained above, the board may delegate its functions to one or more of its members and may also establish auxiliary committees to assist with the tasks for which it is responsible.

Furthermore, and in connection with the trustees' duty of oversight and supervision, the delegation of powers to executive committees or the assignment of functions to managing directors, managers or advisers does not in itself exempt the delegating body from liability under the general rules governing civil liability. In such cases, liability is commonly based on *culpa in eligendo*, *culpa in vigilando* or *culpa in instruendo*, as discussed below.

Finally, any person acting as a trustee of the foundation is subject to the trustees' liability regime. Accordingly, provided that the conditions examined are met, both *de jure* trustees – that is, trustees duly appointed and registered – and *de facto* trustees, to whom the duties legally imposed on the former also apply, may incur liability.

For these purposes, the concept of a *de facto* trustee must be understood, in a broad sense, as a category encompassing all cases in which the foundation has not formally appointed the persons acting as its trustees. In a more restricted sense, common in practice, those who, having been appointed, continue to hold office after their term has expired or where the appointment was made in a defective manner may also be considered *de facto* trustees.

3.3.1. Liability of trustees compared to that of managers and managing directors

The different roles and functions of trustees, managers or managing directors also have different implications for the liability regime. To address these relationships, we must distinguish between the office of trustee and that of manager or managing director:

- (i) The trustee is linked to the foundation through a civil-law relationship of an institutional nature, which grants the powers of administration and representation vis-à-vis third parties.
- (ii) The manager or chief executive is linked to the foundation through an employment contract and may act as an agent who is, in any event, hierarchically subordinate to the board of trustees. Furthermore, the position does not in itself confer authority to represent the foundation, notwithstanding any authority that may be delegated.

As mentioned above, trustees have a duty to manage and promote the foundation in order to achieve its purpose and must, at all times, act in its best interests. This duty requires trustees to exercise due care when selecting, appointing and instructing the manager or chief executive, and when supervising and overseeing the foundation's management and administration by these individuals. The requirements of fault and causal link which, as we have seen, must be met to establish a trustee's liability are deemed satisfied where a trustee has acted negligently and failed to exercise due diligence in carrying out their supervisory and oversight duties in relation to the foundation's management.

This regime, however, does not apply to the manager or chief executive, who does not constitute a governing body of the foundation. Therefore, the nature of the relationship between the individual and the foundation must be considered.

In general terms, the manager or chief executive is entrusted under the relevant contract with a specific mandate, together with defined powers and responsibilities, and is required to ensure the proper performance of that mandate, without assuming any broader duties of oversight and protection of the foundation's interests beyond the scope of the mandate and functions conferred.

Accordingly, any civil liability on the part of the manager or chief executive must be pursued within the framework of contractual liability, without prejudice to any liability that may arise under employment law.

3.3.2. Representatives of corporate trustees

Legal persons may act as trustees of a foundation, and it is common for them to participate in its administration. To this end, the legal person acting as trustee must appoint a natural person as its representative.

In these circumstances, liability attaches to the legal person acting as the foundation's trustee, without prejudice to the foundation's right to bring a claim against the natural person representing it for any damages arising from that person's negligent conduct.

3.4. Exemption from liability

Generally speaking, trustees cannot be held liable unless the conditions for liability under general civil liability regime are met.

Accordingly, the Law establishes a series of grounds for exemption linked to the structure of the board of trustees. Because the board is a collegiate body that acts collectively, trustees may avoid liability where they did not participate in, or expressly opposed, the adoption of harmful resolutions or acts.

Consequently, in carrying out their duties, trustees must consider the implications of their actions and take measures demonstrating that they have acted diligently and in the foundation's interests.

As regards the burden of proof in relation to the key elements of trustees' liability, although the Law contains no express provision on the matter, it provides that a trustee will not be held liable if the trustee can demonstrate that one of the grounds for exoneration applies.

The grounds for exoneration are as follows:

- (i) Having voted against the harmful resolution or act.
- (ii) Not having been involved in the adoption and implementation of the harmful resolution or act and having been unaware of its existence. The trustee must prove both the lack of participation and the lack of knowledge, which extends not only to the existence

of the resolution or the act itself, but also to events occurring after its adoption and implementation. Accordingly, it is not sufficient not to have participated in the adoption of the relevant agreement.

- (iii) Not having participated in the adoption or implementation of the harmful resolution and act despite being aware of its existence. In this case, the trustee must have:
 - a) taken all reasonable steps to prevent the damage (for example, by preventing the implementation of the resolution or by challenging it in court); or
 - b) at the very least, expressly objected to the harmful resolution or act.

3.5. Trustee removal or dismissal as a consequence of liability

Under the rules governing the replacement, removal and suspension of trustees, the Law sets out two grounds linked to the liability regime.

The Law provides that trustees may be removed where (i) they fail to perform their duties with the diligence of a loyal representative, and (ii) a liability action brought by the foundation against the trustees is upheld.

- (i) As regards the first ground for removal, the trustee's lack of diligence in performing their duties must first be declared by a court ruling. In this regard, the declaration may be made either in proceedings concerning a civil liability action brought against the trustee or in separate proceedings brought specifically to obtain such a declaration for the purpose of removing the trustee, without it being necessary for a civil liability action to have been brought.

The Court of First Instance of the foundation's registered office has jurisdiction to hear claims relating to the trustee's lack of diligence performing their duties.

In this case, the Law also expressly recognises the protectorate standing to seek the removal of trustees, without prejudice to any other interested party (e.g. the board of trustees itself, the remaining trustees, the beneficiaries of the foundation or any other person who can demonstrate a legitimate interest) to seek the relevant court declaration.

- (ii) As regards the second ground for removal, the judgment determining the trustee's civil liability must have upheld the liability claim.

As in the case of removal for failing to exercise their duties diligently, the Court of First Instance of the foundation's domicile has jurisdiction over the civil liability action against the trustee.

Finally, the Law grants standing to bring the liability action to the protectorate, the board of trustees, dissenting or absent trustees, and the founder where the founder is not also a trustee.

Furthermore, since Royal Decree-Law 5/2023 of 28 June entered into force, the protectorate has a formal and regulated procedure to seek the judicial dissolution of the foundation where one of the grounds set out in article 31 of the Law applies and the board of trustees fails to approve the dissolution following the request regulated in article 32 *bis* of the Law. This procedure is not automatic but is preceded by administrative proceedings in which the board of trustees must be heard and that must be resolved within nine months. This power increases the pressure on trustees to fulfil their management and compliance duties effectively, to the extent that their inaction may lead not only to their removal, but also to the dissolution of the foundation itself.

4.1. Liability to the foundation

The civil liability of trustees may be enforced through the liability action provided for in the Law, known as a foundation liability action or an action in the interest of the foundation.

As indicated in the previous section, the Law provides that the liability action may be brought before the courts, on behalf of the foundation by (i) the foundation's governing body itself, following a reasoned resolution adopted in which the relevant trustee has not participated, (ii) the protectorate, (iii) dissenting or absent trustees, or (iv) the founder, where he or she is not a trustee.

The trustees' liability action is brought in the interest of the foundation against those who have caused damage to its assets through acts contrary to the Law or the articles of association, or through acts carried out without the diligence required performing their duties. Its purpose is to obtain full compensation for the damage caused and restore the foundation's assets.

There is no legally established limitation period for this action. The existence of a contractual relationship, within which the trustee performs their duties, ultimately allows liability to be reclassified as contractual liability.

If the trustee performs their duties under a contractual relationship, the limitation period is that applicable to contractual obligations for which no specific limitation period is provided, namely five years (article 1964 of the Civil Code).

4.2. Liability to third parties

As mentioned, in relation to this trustees' liability regime, the Law does not expressly provide for trustees' liability *vis-à-vis* third parties, only *vis-à-vis* the foundation. Some regional regulations – such as those in force in Catalonia – do establish a more comprehensive legal regime in this regard.

Nevertheless, according to legal doctrine the existence of an action in the foundation's interest does not preclude third parties with a legitimate interest from bringing other liability actions against the trustees.

In such cases, liability would not be governed by the Law, but instead by the general rules governing liability.

The fact that this is not expressly regulated in the Law could be resolved by applying the general principles of non-contractual civil liability, the application of which to the case of foundation trustees would impose an obligation to compensate for damage caused to a third party by their actions or inactions.

Of the various effects resulting from a declaration of insolvency, those affecting the trustees of foundations, especially the regime governing insolvency liability are worth noting.

As trustees are responsible for managing the foundation, references to directors in the Insolvency Law should be understood, in the case of foundations, as applying to trustees.

Accordingly, once the objective insolvency threshold is met, trustees become subject to specific duties and a special liability regime. First, where the foundation is in a state of actual insolvency, the trustees are required to file for insolvency proceedings to secure a timely declaration of insolvency and thereby protect the foundation's assets and the interests of the creditors, since this increases the prospects of achieving an insolvency solution. Second, trustees may incur personal liability where they have caused or aggravated the foundation's insolvency. In such cases, their assets may be seized from the outset to secure payment to creditors as a means of restoring the assets of the insolvent foundation. In addition, trustees may, among other measures, be ordered to pay part of the claims that remain unpaid following liquidation, if they are declared persons affected by the judgment establishing liability for the insolvency.

5.1. Duty to file for insolvency

Trustees must apply for a declaration of insolvency within two months of the date on which they became aware, or ought to have become aware, that the foundation was in a state of actual insolvency. For these purposes, "actual insolvency" means a situation in which the foundation is unable to meet its due and payable obligations in a timely and regular manner.

When assessing whether the trustees can act, the trustees must propose to the chairperson that a meeting be held to resolve to apply for insolvency proceedings. At that meeting, even if the matter is not on the agenda, the other board members must be informed that the foundation is insolvent and that insolvency proceedings should be initiated, and provided with any supporting evidence. The trustees may request any information or clarifications necessary to determine whether the insolvency criteria are met. If the trustees fail to fulfil this obligation

and no application for insolvency proceedings is made on time, it is presumed, unless proved otherwise, that they acted intentionally or with gross negligence and, accordingly, the insolvency proceedings may be classified as “culpable”, with the corresponding liability consequences.

Furthermore, trustees have the power to apply for insolvency proceedings when insolvency is imminent (rather than “actual insolvency”), that is, when they foresee that the foundation will be unable to meet its due and payable obligations in a timely and regular manner within the following three months.

5.2. Notification of negotiations and its effects

In the event of current insolvency, the trustees may, during the aforementioned two-month period defer or avoid insolvency proceedings by notifying the competent court that they have started negotiations with creditors to agree a restructuring plan (as expressly set out in the Insolvency Law).

Once the trustees notify the court that negotiations have started, the trustees are no longer required to apply for insolvency proceedings, nor may insolvency proceedings be declared at the request of creditors. These effects last for three months, and may be extended for a further three months. During that period, the trustees must negotiate with creditors to agree a restructuring plan. If, when this period expires, the foundation remains insolvent, the trustees must apply for the foundation to be placed in insolvency proceedings within the following business month, to avoid the liability referred to above.

The trustees may notify the commencement of negotiations at any stage of the insolvency, that is, whether the insolvency is current, imminent or probable. Probable insolvency, a concept introduced into the Insolvency Law in 2022, exists where it is objectively foreseeable that, unless a restructuring plan is agreed, the foundation will be unable to meet its obligations as they fall due on a regular basis within the following two years.

5.3. Trustee liability in the classification of insolvency proceedings

Where “de jure” or “de facto” trustees (as defined in this guide) intentionally or through gross negligence cause or worsen the foundation’s insolvency, the insolvency proceedings will be classified as “culpable”. The Insolvency Law establishes a set of rebuttable and irrebuttable presumptions based on conduct that demonstrates wilful misconduct or gross negligence by the trustees.

For example, and among other scenarios, insolvency proceedings are deemed “culpable”, where:

- (i) there is a substantial failure to keep proper accounts, where double accounting is maintained, or there is any irregularity affecting the foundation’s financial or asset position;

-
- (ii) during the two years prior to the declaration of insolvency, assets or rights have been fraudulently removed from the foundation's estate; and
 - (iii) prior to the declaration of insolvency, the foundation carries out any act intended to create a fictitious financial position.

Furthermore, the trustees are presumed, unless proven otherwise, to have acted intentionally or with gross negligence, among other circumstances, where:

- (i) they fail to fulfil their obligation to apply for insolvency proceedings;
- (ii) they fail to cooperate with the insolvency judge or the insolvency administrator; and
- (iii) in any of the three financial years preceding the declaration of insolvency, they fail to prepare annual accounts or to have them audited (where required to do so).

If the court classifies the insolvency proceedings as "culpable", the trustees concerned may face serious consequences. Their liability includes:

- (i) disqualification from managing the assets of others, as well as from representing any person, for a period of 2 to 15 years, as determined in the insolvency classification judgment;
- (ii) the loss of any rights they may have had as creditors of the foundation, as well as the obligation to return any assets or rights improperly obtained from the foundation's estate; and
- (iii) an order to compensate the foundation for the damage caused.

Furthermore, if the foundation enters the liquidation phase, the insolvency judge may order the trustees concerned to pay the insolvency creditors all or part of the amount left unpaid after the foundation's assets have been liquidated (i.e. the insolvency deficit). Liability will depend on whether the conduct attributable to the trustees concerned, which resulted in the insolvency proceedings being classified as "culpable", caused or worsened the foundation's insolvency. Where more than one trustee is found liable, the judgment will specify the amount each trustee must pay based on their degree of involvement in the conduct that caused or worsened the insolvency. In doing so, the court must take into account each trustee's conduct and degree of involvement in the acts that created or worsened the foundation's insolvency.

The liability may affect the foundation's trustees from the outset. The insolvency judge may (either *ex officio* or at the reasoned request of the insolvency administrator) order the attachment of the assets and rights of the *de jure* or *de facto* trustees where there is a possibility that the insolvency proceedings are classified as "culpable" and that the trustees will be ordered to pay all or part of the aforementioned amount. Any attachment order may be replaced by a guarantee issued by a credit institution.

5.4. Determining insolvency liability

Once we have established that a trustee may be held liable in insolvency proceedings, we now need to consider the extent of the court's discretion to order trustees of legal persons found liable in "culpable" insolvency proceedings to pay and to determine the amount payable.

In assessing each trustee's conduct and determining their individual liability, the same parameters analysed in the guide may be taken into account to determine the extent of their civil liability. These include: (i) the type of foundation in question (charitable or commercial); (ii) whether the position is remunerated; and, in particular, (iii) the structure of the foundation's governing body and the trustee's role within it.

Furthermore, from an insolvency law perspective, it is necessary to analyse whether the trustees breached their duty of care and thereby caused or worsened the foundation's insolvency. This assessment requires considering the criteria set out above and the circumstances of each case. Relevant factors include (i) whether the trustee had access – or could have gained access – to documentation relating to the actions taken or the financial situation of the foundation, and (ii) the actions the trustee took when he or she became aware of the foundation's situation.

When it comes to access to information, there are two situations to consider:

- (i) Situations in which the trustee is unaware – and could not have been aware – of the information

A trustee's lack of knowledge of a foundation's financial situation, due to an inability to access the relevant information because of serious and justified circumstances – such as a severe illness – should be sufficient to exempt the trustee from insolvency liability. The trustee should not be held liable for damage they have not caused, because they were unable to act in this case. While this criterion may exempt the affected trustee from liability, it does not apply to the other trustees. Each trustee has a duty to manage the foundation's assets properly and diligently, which means that they must keep themselves informed and act diligently in managing the foundation.

A trustee who actively manages the foundation and takes all reasonable steps to determine its financial situation (including by requesting financial statements, balance sheets and books, and seeking an audit of the accounts), yet whose requests are not met and who takes no decision that causes or worsens the damage, should be exempt from liability.

- (ii) Situations in which the trustee is aware – or could have been aware – of the information

A trustee cannot avoid liability in insolvency proceedings on the basis that he or she was unaware of the foundation's financial situation because, for example, accounting functions had been delegated to an external manager, including where that manager prepared incorrect accounts, since, as explained above, it is the trustee's responsibility to select

the persons to whom functions are delegated and to supervise how those functions are performed. As a general rule, the Law imposes on trustees the obligation to maintain orderly accounts and, therefore, specific responsibility for the annual accounts. This does not prevent a trustee from arguing that the trustee should be exempt from liability where, in the specific circumstances of the case, the accounting irregularity could not reasonably have been detected despite the trustee having acted with due care and diligence.

Trustees may also be held liable where the foundation's financial position deteriorates over time and its accounts are distorted so the foundation appears profitable – even though the irregularity could reasonably have been detected from the annual accounts – if the trustees were aware of the documentation prepared and failed to take steps to clarify and rectify the situation, despite not having participated in the irregularity itself. However, the amount each trustee is ordered to pay may vary depending on the trustee's degree of involvement in the management of the foundation and the decisions taken. Trustees must therefore keep themselves informed about the foundation's activities and ensure that it operates properly. Accordingly, the Insolvency Law provides that, unless proved otherwise, the trustee will be presumed to have been aware that the foundation was insolvent when any of the events giving rise to the actual insolvency occurred (e.g. attachments arising from ongoing enforcement proceedings generally affecting the foundation's assets, or a general failure to meet current payment obligations).

The criteria governing exoneration from liability of the delegating body under the general civil liability regime must also be considered when assessing insolvency liability. A delegating body is unlikely to be exonerated from the acts of the delegate where those acts were known – or could have been known – through diligent supervision.

Conversely, where trustees become aware that the foundation is facing financial difficulties and fail to take steps to address the situation (e.g. through resolutions to increase the foundation's assets or to apply for insolvency proceedings) or take decisions that worsen the situation (e.g. increasing the foundation's indebtedness that cannot reasonably generate sufficient resources to meet its obligations), they are unlikely to be exempt from insolvency liability. In such circumstances, the trustees may be considered as having acted negligently – by causing or worsening the insolvency – by failing to take measures to prevent the foundation from being able to meet its current or imminent obligations.

5.5. Relationship between civil and insolvency liability

The insolvency liability described above is intended to protect the foundation's creditors against trustees whose conduct causes or worsens the foundation's insolvency. In this regard, a trustee who has contributed to the insolvency may end up effectively becoming the "guarantor" of the debt, with all his or her personal assets, that the foundation owed its creditors that remain unpaid after the insolvency proceedings.

However, the declaration of insolvency does not entirely displace the trustees' civil liability regime, although it affects how that regime operates. Any action by the foundation to enforce

the trustees' corporate liability may be brought exclusively by the insolvency administrators. By contrast, declaring the foundation insolvent does not prevent individual actions for any non-contractual liability incurred by the trustees.

URÍA
MENÉNDEZ

www.uria.com